

In the High Court of Travancore-Cochin.  
Before  
The Hon'ble Shri N. Varadaraja Iyengar, Judge.  
The Hon'ble Shri P.D. Nandana Menon, Judge.

A. S. No. 5 of 1955.  
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O.S.No.161 of 1951 of the District Court of Quilon.

Appellant: 1st defendant.  
Sankara Pillai Pachu Pillai, Kumaramangalathu Putten Veedu,  
Kizhakkekara Muri, Kottarakara Pakuthy.  
By advocate Shri T.K. Narayana Pillai.

Respondents: Plaintiffs 1 and 2.

1. Kumara Pillai Krishna Pillai of Kumaramangalathu Putten Veedu, Kizhakkekara Muri, Kottarakkara Pakuthy.

2. Kumara Pillai Ramakrishnan Nair of do.

1st respondent by Advocate Shri S. Narayanan Potti.

This appeal having been heard on 7. 3. 1956 the court on

14. 3. 1956 delivered the following

Judgment.

*Wb*

N. Varadaraja Iyengar & Nandana Menon, JJ.

Appeal Suit No. 5 of 1955.

Judgment.

Delivered by Nandana Menon, J.

This appeal is by the first defendant in the suit. The circumstances leading to this appeal are as follows: The plaintiffs claimed to be the sons of Ayyarpan Pillai Kumara Pillai of Mangalath Puthen Veedu. The defendants are the sons of Kumara Pillai's brother, deceased Sankara Pillai. Sankara Pillai and Kumara Pillai had executed a hypothecation bond copy of which is filed as Ex.C dated 9. 3. 1104 in favour of one Bhanu Bhanu Pandara hil for 7000 fanams. On the basis of that bond Pandarathil obtained a decree in O.S. 616 of 1109 and assigned the rights - thereunder to one Bhaskaran Nayar. When the assignee sought to execute the decree the first defendant contended that the decree debt had been discharged. The execution court upheld that plea but in appeal the assignee decreeholder was allowed to realise the whole debt from Kumara Pillai. Thus the properties of Kumara Pillai secured for the debt became liable for the entire amount due under the decree. The plaintiffs came forward with the suit contending that the amount had been borrowed for the purpose of Sankara Pillai and hence they are entitled to be reimbursed with regard to the entire decree debt from the assets of Sankara Pillai. The first defendant contended, on the other hand, that the debt was incurred for the purpose of Kumara Pillai alone, that Sankara Pillai had no liability in the matter, that the debt had been discharged and that the suit was barred. Even the status of the plaintiffs as the legal representatives of Kumara Pillai was questioned. The lower court held that the plaintiffs are the representatives-in-interest of Kumara

Pillai, that the debt was incurred for the benefit of both Kumara Pillai and Sankara Pillai and that both of them were liable to pay the decree debt in O.S. 616 of 1109 in equal halves. Hence the claim of the plaintiff to realise one half of the decree debt was upheld.

2. The only point pressed in this appeal is that the direction that the decree debt in O.S. 616 of 1109 is to be satisfied by both parties in equal halves is not proper. The other findings of the lower court are correct and cannot be questioned. Regarding apportionment, on behalf of the appellant it was pointed out that the principle laid down in section 82 of the Transfer of Property Act has to be applied. ~~Now~~ The relevant portion of the said section is as follows:

"Where property subject to a mortgage belongs to two or more persons having distinct and separate rights of ownership therein, the different shares in or parts of such property owned by such persons are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, and, for the purpose of determining the rate at which each such share or part shall contribute, the value thereof shall be deemed to be its value at the date of the mortgage after deduction of the amount of any other mortgage or charge to which it may have been subject on that date".

Here no contract to the contrary is proved. So applying the aforesaid section the debt is to be apportioned on the basis of the value of the properties to each of the hypothecators at the time of the hypothecation. Though the transaction in question was effected in Travancore area at a time when the Transfer of Property Act was not in force there still it is clear that the principle of section 82 is to be applied in view of the decisions in the Travancore High Court. Thus in Varghese v. Ouseph (28 T.L.J. 521) where a similar question arose for consideration it was held that the principle laid down in section 82 is to be followed. At page 526 it is observed as follows:

"Section 82 of the Transfer of Property Act gives only statutory effect to the well known rule stated by Fisher in his work on Mortgages, 6th Edition, page 688, in the following terms:

"If several estates (whether of one or several owners) be mortgaged for or subject equally to the debt..... the several estates shall contribute ratably to the debt, being valued for that purpose, after deducting from each estate any other incumbrances by which it is affected".

"This rule rests upon the principle that the fund, which is equally liable ~~for~~ with another to pay the debt, shall not escape because the creditor has been paid out of that other fund alone". The necessary effect of the above rule and of section 82 of the Transfer of Property Act which has given legislative recognition to that rule is, that, where one of the mortgaged estates has contributed more than its own quota of liability, the owner of that estate is entitled to recover that excess from the other estates subject to the mortgage and acquires a charge on those estates".

The same principle has been laid down in Aricker v. Aricker.

Gosala Iyer (31 M.L.J. 613). There at page 614 it is stated as follows:

"On the analogy of the principle laid down in section 82 of the Transfer of Property Act, the contribution which each part will have to make ~~will~~ have to be determined on its value on the date of the mortgage. In the amended section 82, it is expressly stated that the valuation of the properties for purposes of contribution should be made as at date of mortgage".

So in the present case the lower court was wrong in directing both parties to contribute equally to the decree debt without going into the question of the value of the respective properties of Kumara Pillai and Sankara Pillai hypothecated under Ex.C. On behalf of the plaintiffs it was represented that they have now paid off the entire decree debt. So apportionment of the decree debt satisfied by the parties is to be made on the basis of the value of the properties of Kumara Pillai and Sankara Pillai mortgaged under Ex.C on that date. If any part of the decree debt had been discharged by the defendants that also has to be taken into account.

3. In the result, the lower court's decree is set aside as regards that point and the case remanded for a proper apportionment in the light of the observations made above and for the passing of a decree according to law. The parties to be allowed to adduce any additional evidence necessary for

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the said purpose. Both parties will bear their own costs  
in this court. The court fee paid will be refunded.

14. 3. 1956.

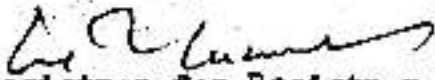
Sd. N. Varadaraja Iyengar, Judge.

Sd. P. D. Nandana Menon, Judge.

Compaid by

(True copy)

/Sd.                      Clerk

  
Dy. Registrar for Registrar.